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Supreme Court, U.S.
FILED
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No. (2)

In The
Supreme Court of the United States

RAFAL PIETRZAK,

Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

RAFAL PIETRZAK	§	
VS.	§	CIVIL ACTION NO. 4:05 CV 173
DIRECTOR	§	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

(Filed Aug. 2, 2006)

Petitioner Rafal Pietrzak, an inmate confined in the Texas prison system proceeding *pro se,* brings this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred for findings of fact, conclusions of law and recommendations for the disposition of the case.

History of the Case

On March 3, 1998, the Petitioner was convicted of aggravated sexual assault in the 380th Judicial District Court of Collin County, Texas, following a plea of not guilty. He was sentenced to 30 years imprisonment and a $10,000.00 fine. He filed a direct appeal which was dismissed because notice of appeal was filed one day late. His petition for discretionary review was refused on June 7, 2000. He sought and was granted an out-of-time appeal through state habeas corpus. The judgment was then affirmed on

appeal on January 23, 2003. He filed two applications for a post-conviction writ of habeas corpus in state court which were denied on November 24, 2004, and November 23, 2005, respectively.

The present petition was filed on May 6, 2005. Respondent filed his Motion to Dismiss on July 7, 2006.

Petitioner alleges the following:

1. Violation of rights under the Vienna Consular Relations and Due Process rights, because the police failed to notify the Polish Consulate that Pietrzak had been detained and because the police failed to admonish him that he had a right to request assistance from the Polish Consulate;

2. Violation of rights under the Consular Relations Convention and Protocols signed at Warsaw and Due Process Rights, because the police failed to notify the Polish Consulate that Petition [sic] had been detained and because the police failed to admonish him that he had a right to request assistance from the Polish Consulate;

3. Ineffective assistance of counsel;

4. Jury Misconduct/due process violations.

Discussion and Analysis

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA")

was signed into law. The law made several changes to the federal habeas corpus statutes. 28 U.S.C. § 2244(d)(1) imposes a one year statute of limitations for habeas cases filed by state prisoners. The Fifth Circuit discussed the approach that should be taken in applying the one year statute of limitations in *Flanagan v. Johnson,* 154 F.3d 196 (5th Cir. 1998) and *Fields v. Johnson,* 159 F.3d 914 (5th Cir. 1998). Section 2244(d)(1)(A) specifies that the one year limitations period shall run from the date a judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.

In the present case, according to his application and information from the Texas Court of Criminal Appeals: The Petitioner was convicted on March 3, 1998. His notice of appeal was filed one day late but the Court of Appeals did not issue a dismissal until January 4, 2000. His conviction was final for purposes of calculating his federal limitations period on February 3, 2000. He filed his Petition for Discretionary Review 84 days after the Court of Appeals dismissed his case – on April 27, 2000. His Petition for Discretionary Review was refused on June 30, 2000. He did not file his state petition for writ of habeas corpus for 321 days. He filed May 17, 2001, and it was denied on June 7, 2001. He waited just 11 days before filing a state petition for writ of habeas corpus seeking out-of-time appeal. He filed his application on June 18, 2001, and was granted out-of-time appeal on September 19, 2001, with mandate on October 15, 2001. On October 11, 2001, he filed his timely notice

of appeal and on January 23, 2003, his conviction was affirmed. Petitioner waited 203 days before filing his second state court petition for writ of habeas corpus. He filed on August 14, 2003 and was denied, without written order on finding of the trial court without a hearing, on November 24, 2004. He waited 162 days before filing his third state court petition for writ of habeas corpus. He filed on May 5, 2005, and was denied without written order on November 23, 2005. He waited 164 days to file his federal application for writ of habeas corpus on May 6, 2006. He thereafter filed his Petition for Writ of Certiorari which appears to be pending at this time.

Petitioner's claims are timebarred. His claims regarding his trial are timebarred based on 28 U.S.C. 2244(d)(1)(A). As to his claims regarding the Vienna Convention, the Supreme Court, in *Breard v. Greene,* 523 U.S. 371 (1998), held that claims regarding the Vienna Convention are subject to procedural default rules. *See also, Sanchez-Llamas v. Oregon,* ___ U.S. ___, 2006 WL 1749688 (June 28, 2006); *Cardenas v. Dretke,* 405 F.3d 244, 252-253 (5th Cir. 2005). The Supreme Court did not decide whether the Vienna Convention grants individual rights. *Sanchez-Llamas,* 2006 WL at *7. Thus, the Supreme Court did not issue a new rule of constitutional law that serves as a triggering event for the AEDPA statute of limitations pursuant to 28 U.S.C. § 2244(d)(1)(D). Petitioner's

claims regarding the Vienna Convention are time-barred.[1]

In the present case, the Petitioner waited over seven years after his actual conviction to bring this action. Even with tolling, Petitioner is over two years outside the statute of limitations. The Petitioner has not shown that any of the other provisions of § 2244(d) or principles of equitable tolling save the petition; thus, it is barred by the statute of limitations.

Recommendation

It is accordingly recommended that the Motion to Dismiss filed by Respondent should be granted and the above-styled petition for writ of habeas corpus should be denied and the case should be dismissed with prejudice.

Within ten (10) days after receipt of the magistrate judge's report, any party may serve and file

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[1] It is also questionable whether the Vienna Convention would apply in that it does not appear that Petitioner has alleged or shown that he requested consular assistance or informed police that he was a citizen of Poland. *See, U.S. v. Lombera-Camorlinga*, 206 F.3d 882, 885, 9th Cir. 2000) [sic]. It is further is not [sic] clear what result Petitioner seeks from the application of the Vienna Convention or what harm he alleged was incurred because he was not told of his consular rights. Suppression of evidence or confessions is not an available remedy for violation of the Vienna Convention. *U.S. v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir. 2001)

written objections to the findings and recommendations contained in the report.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within ten days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United States Auto Ass'n.*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

SIGNED this 1 day of August, 2006.

/s/ Don D. Bush
DON D. BUSH
UNITED STATES
MAGISTRATE JUDGE